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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME ERIC CASTRO,

Defendant and Appellant.

B290265

(Los Angeles County  
Super. Ct. No. BA461463)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed as modified.

Alan E. Spears, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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At the jury trial of Jaime Eric Castro for inflicting corporal injury resulting in a traumatic condition on his girlfriend, the trial court admitted evidence of Castro's prior domestic abuse under Evidence Code section 1109.<sup>1</sup> The jury found Castro guilty. He now appeals, contending he was prejudiced by the improper admission of the evidence. He also raises various sentencing errors. We modify the judgment to strike a domestic violence fine and to correct the award of custody credits. We otherwise affirm the judgment as modified.

### **BACKGROUND**

On September 4, 2017, the victim and Castro were dating, and she was two-to-three months pregnant with their child. That night, Castro came over. He was drinking and they argued. The argument turned physical, and he punched her in the stomach and strangled her, causing her to lose consciousness and leaving marks on her neck. The victim called 911 and, while reporting the incident, referred to a prior incident in which Castro threatened her with a knife. Castro was arrested. Thereafter, during phone calls between an incarcerated Castro and the victim, Castro said he was not mad at her for telling the truth, that he would take responsibility for what he did, and that it was his "bad for fucking doing some stupid shit like that."

Based on this incident, Castro was charged with and a jury found him guilty of inflicting corporal injury resulting in a traumatic condition upon a cohabitant, girlfriend or child's parent. (Pen. Code, § 273.5, subd. (a).) On May 7, 2018, the trial court sentenced Castro to three years in prison. The trial court

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<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

also imposed fines and assessments, including a domestic violence fine, and awarded custody credits.

## **DISCUSSION**

### **I. Motion for a mistrial**

#### *A. Additional background*

After the incident, the victim called 911 and told the operator that Castro always carried a knife. When the operator asked if Castro had threatened the victim with the knife, she said, “Yeah, he threatened me before.” The People sought to admit the call under section 1109 as a prior instance of domestic violence. The trial court agreed.

Thereafter, the 911 call was played for the jury. The victim, however, then denied that Castro had threatened her in the past or physically abused her other than on the occasion at issue. The prosecutor tried to clarify her testimony: “But you told the 911 operator that he [had] threatened—he [had] threatened [you] before with the knife?” The victim denied that Castro had ever threatened her with a knife, and she was unsure why she told the 911 operator he had. Although Castro had verbally abused her by calling her a “[f]ucking bitch” and “whore,” she now claimed he had never physically abused her in the past.

At the close of evidence, the defense moved for a mistrial on the ground the 911 call was not admissible under section 1109. The trial court indicated it would have excluded the evidence had it “known that the testimony would come out as it did.” Nonetheless, the trial court denied the motion for a mistrial and instead gave this limiting instruction:

“There was some testimony in this case that was presented by [the victim] that on an occasion before this incident that brings this case into this courtroom she had been subjected to verbal or emotional abuse by . . . Castro. That was conduct that was not reported to the police. When the evidence was given by [the victim] there may have been an understanding that this was physical abuse that she had been subjected to previously by [Castro], however, that was not the testimony or the evidence before you. There is no evidence of prior physical abuse by . . . Castro, it was abuse that was alleged to be verbal and emotional. [¶] You may not consider the verbal or emotional abuse for purposes of determining whether the facts in the case before you have been proved. The verbal or emotional abuse may be considered by you for purposes of anything else related to the relationship, but they do not go to prove the underlying facts in this case because the evidence in this case involved physical abuse as you will hear in the jury instructions that I give you.”

B. *Admissibility of the evidence*

Castro moved for a mistrial based on the admission of the prior incident of domestic violence. Such a motion should be granted only when a party’s chances of receiving a fair trial have been irreparably damaged. (*People v. Clark* (2011) 52 Cal.4th 856, 990.) Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis which the trial court is in the best position to conduct. (*People v. Chatman* (2006) 38 Cal.4th 344, 369–370.) Hence, we review an order denying a motion for mistrial under the deferential abuse of discretion standard. (*Clark*, at p. 990.)

No abuse of discretion is apparent here. Notwithstanding the trial court’s change of heart, the 911 call was admissible.

Generally, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (§ 1101, subd. (a).) Section 1109 provides an exception to this rule. The section provides that in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by section 1101, if admissible under section 352. (§ 1109, subd. (a).) In enacting section 1109, the Legislature considered the difficulties of proof unique to prosecuting domestic violence cases, when compared with other crimes where propensity evidence may be probative but has been historically prohibited. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333–1334.) Such difficulties include the tendency of domestic violence victims to recant. (*People v. Brown* (2004) 33 Cal.4th 892, 899.)

Here, the victim's statement to the 911 operator suggested that Castro had, on a prior occasion, threatened her with a knife. Such conduct falls under the definition of domestic violence: intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to herself or another. (Pen. Code, § 13700, subd. (a).) Therefore, the statement was admissible under section 1109. The victim's denial at trial that Castro had ever physically threatened her did not impact the statement's admissibility. The jury was entitled to reject her denial and to instead believe she was minimizing her abusive history with Castro. The trial court therefore had no need to give the limiting instruction, which was misleading in that it suggested the jury could not consider evidence of prior threatening behavior in its determination of Castro's guilt. Castro thus benefitted from the

instruction telling the jury it could not consider the prior incident for the purpose for which it had been properly admitted initially.<sup>2</sup>

In any event, we discern no prejudice. Error in admitting evidence of a defendant's prior act of domestic violence under section 1109 is reviewed under the standard of prejudice in *People v. Watson* (1956) 46 Cal.2d 818, whether it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145.) The victim did not waver in her testimony that Castro strangled her. The responding officer corroborated the victim's testimony that Castro strangled her, because the officer saw the red marks Castro left on the victim's neck. Castro admitted he physically abused the victim, saying she had told the truth and that he would take responsibility for his actions. Based on this evidence, it is not reasonably probable a result more favorable to Castro would have resulted in the absence of the challenged evidence.

## II. Domestic violence fee

The trial court imposed a \$400 domestic violence fine (Pen. Code, § 1203.097, subd. (a)(5)). That fee, however, may be imposed when the defendant is sentenced to probation. (*Id.*, subd. (a).) Castro was not sentenced to probation. He was

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<sup>2</sup> To the extent Castro also argues on appeal that the trial court should have excluded evidence he emotionally or verbally abused the victim by calling her a “[f]ucking bitch” and a “whore,” he did not object below. Any issue as to that evidence is therefore forfeited. (See *People v. Doolin* (2009) 45 Cal.4th 390, 448.)

sentenced to three years in prison. The fine therefore must be stricken.

### III. Custody credits

The trial court awarded 139 days of actual custody credits plus 139 days of conduct credits for a total of 278 days. However, Castro was entitled only to 138 days of conduct credits. (See Pen. Code, § 4019, subd. (f); *People v. Whitaker* (2015) 238 Cal.App.4th 1354.) We therefore reduce his total custody credits to 277 days.

### IV. Ability to pay hearing

Without objection from Castro, the trial court imposed a \$400 restitution fine under Penal Code section 1202.4, subdivision (b), a \$30 court facility assessment under Government Code section 70373, and a \$40 court operations assessment under Penal Code section 1465.8. Under recent authority holding that such a fine and assessments may not constitutionally be imposed absent evidence of the defendant's ability to pay them, Castro contends that the matter must be remanded so that the trial court can conduct an ability to pay hearing. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157.) We disagree because the issue was forfeited.

*People v. Dueñas, supra*, 30 Cal.App.5th at page 1169 concerned imposition of the minimum fine under Penal Code section 1202.4, subdivision (b). The scenario involving a minimum fine, however, is not before us. Here, the trial court imposed a \$400 restitution fine. Under that circumstance, the statute provides that a court may consider a defendant's inability to pay. (Pen. Code, § 1202.4, subd. (d); *People v. Avila* (2009) 46 Cal.4th 680, 729.) Castro did not object to the \$400 fine. Having failed to object on the ground of inability to pay, the issue is

forfeited as to the fine and to the assessments. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Scott* (1994) 9 Cal.4th 331, 353.)

### **DISPOSITION**

The \$400 domestic violence fine imposed under Penal Code section 1203.097, subdivision (a)(5) is stricken. Jaime Eric Castro is awarded 139 days of actual custody credits and 138 days of conduct credits, for a total of 277 days. The clerk of the superior court is directed to prepare a modified abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed as modified.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.